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IN THE

# Supreme Court of the United States

October Term, 1963

No. 110

WILLIAM MALLOY,

*Petitioner,*

*against*

PATRICK J. HOGAN, Sheriff of Hartford County,

*Respondent.*

**On Writ of Certiorari to the Supreme Court of Errors of the State of Connecticut**

## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

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## BRIEF OF NATIONAL DISTRICT ATTORNEYS' ASSOCIATION, *AMICUS CURIAE*

### Introduction: Interest of *Amicus*

The National District Attorneys' Association is an interstate organization of local prosecutors, devoted to improving the quality of law enforcement. While the Association supports the position of respondent in the case at bar, its concern in this brief is with matters not directly raised by the parties: possible implications of this case for the validity of state "immunity statutes."

## ARGUMENT

**The Court's resolution of the questions presented in this case should not impair the effectiveness of state immunity statutes.**

Privileges against self-incrimination are contained in the constitutions of forty-eight states, and in the statutes or common law of the remaining two [see 8 Wigmore, EVIDENCE §2252, n. 3 (McNaughton rev. 1961); 58 AM. JUR., *Witnesses* §36; Kroner, *Self Incrimination : The External Reach of the Privilege*, 60 COL. L. REV. 816, nn. 4-7 (1960)]. To honor these privileges without sacrificing vital investigations of crime, all of the states have passed statutes that grant immunity from prosecution for any state crime revealed by a witness, in exchange for the witness's testimony [see Wigmore, *supra*, §2281, n. 11]. Many states have also enacted laws that compel a witness to answer incriminating questions, but prohibit use of such testimony against him. State courts have consistently held that by precluding state prosecution an "immunity statute" effectively supplants the state privilege against self-incrimination [see Wigmore, *supra*, §2281; Note, 38 A.L.R. 2d 225].

A state is powerless, however, to give witnesses immunity from prosecution beyond its jurisdiction—in other states, or in federal courts [*Knapp* v. *Schweitzer*, 357 U.S. 371 (1958); *Jack* v. *Kansas*, 199 U. S. 372 (1905)], although Congress may, under the supremacy doctrine, confer upon witnesses in federal proceedings immunity from prosecution by the states [U. S. CONST. Art. VI, §2; *Adams* v. *Maryland*, 347 U. S. 179 (1954); *Ullmann* v. *United*

*States*, 350 U. S. 422 (1956); *Brown* v. *Walker*, 161 U. S. 591 (1896)]. While there are few state decisions directly concerning the power of a state to compel testimony that may incriminate under the laws of another state, many state courts have passed upon claims of possible incrimination under federal penal statutes. In the latter cases, state immunity statutes are generally upheld [see Wigmore, *supra*, §2258, n. 6; Kroner, *op. cit. supra*, pp. 827-35; 58 AM. JUR., *Witnesses*, §§51, 89; Notes, 59 A.L.R. 895; 82 A.L.R. 1380; 38 A.L.R. 2d 225]. This situation first came before the Supreme Court in *Jack* v. *Kansas* [199 U. S. 372 (1905)]. Jack, a witness in a state investigation of violations of the state anti-trust act, refused to answer questions under a grant of immunity, and alleged possible incrimination under federal anti-trust laws. His conviction for contempt was upheld by this Court, over his claim of deprivation of due process under the Fourteenth Amendment: "We think the legal immunity is in regard to a prosecution in the same jurisdiction, and when that is fully given it is enough" [*id.* at 382]. The Court also found no "real danger" of a federal prosecution. Thus, *Jack* v. *Kansas* created almost a "conclusive presumption" that the danger of federal prosecution is unlikely [see Grant, *Immunity from Compulsory Self-Incrimination in a Federal System of Government*, 9 TEMPLE L. Q. 57, 70 (1934)].

These principles were reasserted in *Knapp* v. *Schweitzer* [357 U. S. 371 (1958)]. In that case, an employer in a business in interstate commerce refused to testify in a state grand jury investigation of labor corruption, despite a grant of immunity, on the ground that the state

did not protect him against federal prosecution under the National Labor-Management Relations Act of 1947. This Court rejected his contention, primarily for reasons of the "historic distribution of power as between Nation and States in our federal system" [*id.* at 375]. *Knapp* v. *Schweitzer* has since been reaffirmed [*Mills* v. *Louisiana*, 360 U. S. 230 (1959); see *Slagle* v. *Ohio*, 366 U. S. 259 (1961)]. To rule otherwise, in "these days of the extensive sweep of such federal statutes as the income tax law," would be largely "to withdraw from the states their traditional power to investigate in aid of prosecuting conventional state crimes" [*Knapp* v. *Schweitzer*, *supra*, pp. 374-375, 378-379].

The grant of the instant writ of certiorari has aroused concern, however, as to the future viability of the state immunity statutes. Petitioner argues that the Fifth Amendment privilege against self-incrimination should be enforceable against the states. When *Knapp* v. *Schweitzer* and *Jack* v. *Kansas* were decided, as now, the states were bound solely by their own privileges against self-incrimination [see *Adamson* v. *California*, 332 U. S. 46 (1947); *Twining* v. *New Jersey*, 211 U. S. 78 (1908)]. If the states were obliged to honor the federal privilege, it might be argued, the immunity required to replace the privilege would have to be broader, and extend to possible federal prosecutions. Since the states cannot give such immunity, their power to question witnesses would be curtailed. This view appears in the instant case. A Friend of the Court urges, as one of the reasons for holding the privilege of the Fifth Amendment obligatory upon the states, that if the

federal privilege applied to the states, the states would be unable to compel testimony that might incriminate under federal statutes (see Brief of American Civil Liberties Union, *Amicus Curiae*, pp. 15-16).

This view of the implications of the case at bar for state immunity statutes is, we believe, incorrect. It stems largely from the confusing way in which the issues are commonly expressed: in physical metaphors. In this mode of expression, the privilege of the Fifth Amendment is said to "cover" the states, like a blanket (Brief for Petitioner, p. 4). The privilege is therefore deemed to "reach" from the federal courthouse across the street to the state grand jury room [*cf.* Kroner, *Self Incrimination: The External Reach of the Privilege*, 60 COL. L. REV. 816 (1960)]. Supposedly covered by this enormous federal blanket, the witness in the state proceeding scorns his grant of state immunity, which, too "narrow" to replace the federal protection, would leave him exposed to the drafts of federal justice.

The fault of this metaphorical treatment of the issues is its suggestion that what is involved here is the dimension of the privilege, not its nature. The actual question is whether the states are obliged to enforce certain principles that are also enforced in federal proceedings; the thrust of this case is the nature of the standards that state courts must enforce within their own realm, not the physical, geographical "coverage" of federal authority. Confusion is replaced by clarity if the issues in this case are expressed in terms of the "obligations" cre-

ated by the Fourteenth Amendment,[1] or the "enforceability" of the privilege in the states.[2]

Under the present state of the law, there is no reason to believe that the inclusion in the due process concept of a privilege against self-incrimination that is equivalent to the privilege of the Fifth Amendment would enfeeble state immunity statutes, despite the absence of immunization against federal prosecution. Under the present Fifth Amendment privilege,

> "full and complete immunity against prosecution by the government compelling the witness to answer is equivalent to the protection furnished" [*United States* v. *Murdock*, 284 U. S. 141, 149 (1931); see *Hale* v. Henkel, 201 U. S. 43 (1906); *Jack* v. *Kansas*, 199 U. S. 372, 382 (1905)].

Under this clear and controlling precept, even were the states required to provide the same type of privilege that now obtains in federal courts, the state immunity statutes would remain a sufficient substitute, because the privilege now enforced in federal proceedings is not "cross-juris-

1. *Cf. Gideon* v. *Wainwright*, 372 U. S. 335, 83 S. Ct. 792, 795 (1963): "We accept Betts v. Brady's assumption, based as it was on our prior cases, that a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made *obligatory* upon the states by the Fourteenth Amendment. We think the Court in Betts was wrong, however, in concluding that the Sixth Amendment's guarantee of counsel is not one of these fundamental rights". (emphasis added).

2. *Cf. Wolf* v. *Colorado*, 338 U. S. 25, 27-28 (1948): "The security of one's privacy against arbitrary intrusion by the police—which is at the core of the Fourth Amendment—is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such *enforceable* against the states through the Due Process Clause" (emphasis added).

dictional." Thus, the principle of *Knapp* v. *Schweitzer* would be unaffected by a holding that this privilege is an element of due process. Of course, the opinion in *Knapp* pointed out that the Fifth Amendment privilege, along with other provisions of the Bill of Rights, was not obligatory upon the states. But this reference was not essential to the holding in *Knapp*, with its forceful enunciation of vital public policies: the historic reliance upon the states for the prosecution of conventional crimes, and the drastic effect upon these prosecutions if related Congressional legislation could be asserted as a bar to state investigations.

Plainly, a state may require testimony if the state gives the witness all the protection within its power—full immunity from state prosecution. But it need not follow that the testimony thus gained may be turned against the witness in a federal forum. The two matters are separate; the first is a problem of production, the second of use [see *Feldman* v. *United States* (dissenting opinion), 322 U. S. 471, 497 (1944); 8 Wigmore, EVIDENCE §2258, n. 3 (3rd ed. 1940), 1959 Supp. p. 125; Kroner, *op. cit. supra*, pp. 836-37]. Desirable policies concerning the administration of justice in the federal courts may well counsel the exclusion of such testimony at a federal trial. The sole obstacle to this result is the holding of *Feldman* v. *United States*, *supra*, a 4-3 decision, that self-incriminating testimony compelled under a state immunity statute is admissible at a federal criminal trial. If this ruling were reconsidered in an appropriate case [see *Knapp* v. *Schweitzer*, 357 U. S. 371, 381, 382, 384 (1958); *Mills* v. *Louisiana*, 360 U. S. 230-231, 233-234, 238-239 (1959)], such testimony could be ex-

cluded from federal courts under this Court's general power of supervision over federal justice [see *Elkins* v. *United States*, 364 U. S. 206 (1960); *McNabb* v. *United States*, 318 U. S. 332 (1943)], without impairing valuable state investigations. There is no cause for fear that this would permit interference with federal law enforcement by local investigators. Overruling *Feldman* would entail merely an exclusionary rule in federal trials, not immunity from federal prosecution. No undue prejudice to the government would occur, since the government would be in the same position as if there had been no local inquiry. In short, to solve the problems created by squaring *Feldman* v. *United States* with *Knapp* v. *Schweitzer*, sound policies of federalism indicate reconsideration of *Feldman*, not of *Knapp*.

This entire discussion assumes, *arguendo*, a holding in this case that the states must confer a privilege against self-incrimination that is substantially that of the Fifth Amendment. This line of reasoning is not intended to approve petitioner's position. Considering, however, that several Justices of this Court have announced for such a holding in previous cases, *Amicus* has considered some of the possible implications of the proposed holding. Curiously, the discussion has amounted to a dialogue between two Friends of the Court (see Brief of ACLU, pp. 15-16) on matters that are not involved in the facts of the case or raised by the parties. But such discussion is essential. Whatever the decision of this Court on the issues presented, language that failed to take account of these principles could create unnecessary doubts as to the force of *Knapp* v. *Schweitzer*—itself decided only after thorough

consideration of the policies behind the states' power to grant immunity. Then the state courts, witnesses, and their counsel might incorrectly consider the decision a justification for silence (see, *e.g.*, Brief of ACLU, pp. 15-16), and the benefit of *Knapp* to urgent state inquiries would be lost.

## Conclusion

***The judgment below should be affirmed, and the effectiveness of state immunity statutes should be unimpaired by this Court's decision.***

Respectfully submitted,

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